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# Developing mediation and restorative justice for young offenders across Europe

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## 1. Introduction

In recent years there has been a dramatic growth in alternative responses to criminal offending. In particular, the use of mediation and restorative approaches have emerged as important innovations and have come to exert an increasingly strong influence in criminal justice systems across Europe. The growing influence of mediation and restorative justice has developed as policymakers have become more concerned about the capacity of traditional criminal systems to deliver participatory processes and fair outcomes that are capable of benefiting victims, offenders and society at large. This concern has been caused in part by the structure and process inherent to the orthodox criminal justice system, whereby crime has essentially been conceptualised as the violation of the state's law by an individual. As such, most western criminal justice systems, particularly during the trial phase, tend to be bipartisan in nature, and largely reflect the normative duality of the contest between the state and the offender (Zehr 1990; Fattah 2004; Doak 2008). By contrast, mediation and restorative justice does not view crime through such a narrow lens, but seeks to resolve conflicts by addressing the wider needs of victims, offenders and even the broader community.

The growth of mediation and restorative justice has also been spurred on at European and international levels by the development of initiatives grounded in restorative principles. International instruments have increasingly viewed restorative- and mediation-based interventions as a legitimate, if not superior, means of delivering justice. In placing a strong emphasis upon participation and reparation, international trends have exerted a downward pressure upon national

governments to develop policies based on mediation and restorative justice principles. At European level, for instance, the EU Framework Decision calls on Member States to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. Article 10(2) calls on Member States to ensure that "any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account". The Council of Europe has also recognised the growing tendency for states to integrate mediation and restorative measures within their criminal justice systems, and issued a detailed set of principles in support of this trend in its Recommendation (99) 19 "Concerning Mediation in Penal Matters". The Recommendation, which consists of 34 articles, recognises that there is a need for both victims and offenders to be actively involved in resolving cases themselves with the assistance of an impartial third party. These provisions reflect internationally recognised principles of best practice, including the importance of specific training for mediators, the principle of voluntariness for participants, the need for judicial supervision, and the need to ensure that procedural human rights guarantees are safeguarded. In addition, Member States are encouraged to promote research and evaluation of mediation processes.

The Council of Europe's Recommendation was also adopted as the basis for part of the United Nations Vienna Declaration on Crime and Justice,<sup>1</sup> which committed the Member States "to introduce, where appropriate, national, regional and international action plans in support of victims of crime, such as mechanisms for mediation and restorative justice". It committed States to review their relevant practices, to develop further victim support services and awareness campaigns on the rights of victims and to consider the establishment of funds for victims, in addition to developing and implementing witness protection policies (at para 27).

However, the rapid growth of mediation and restorative justice initiatives at an international level has led to a raft of divergent practices and a lack of consensus on how they should be implemented. As a result mediation and restorative justice programmes worldwide vary considerably in terms of what they do and how they seek to achieve their outcomes. Very often the practical operation of schemes differs according to the situation and the manner in which individual programmes have evolved. As such, there is no single "prototype" format for practices that adopt the "mediation" or "restorative" labels. In relation to criminal justice, restorative and mediation programmes differ, not least in relation to their degree of formality and legality. Some schemes are based in statute and require that offenders are dealt with through rigid frameworks. In such instances, considerable resources are often invested across a range of statutory agencies, and widespread training and a change in working culture of the police and prosecutor is required. By contrast, other schemes are "voluntary"

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1 Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21<sup>st</sup> Century (UN Doc A/CONF.187/4).

or practice-led, and thus may be much more informal. Typically, such schemes lie on the fringes of the criminal justice system and as a result, frequently experience problems with resources and logistics. Even where schemes do become part of a formal criminal justice system, the conditions for referring an offender vary considerably, with some programmes taking referrals as diversionary interventions, or as a form of police caution, while others may be referred by the prosecutor or by the courts as an official form of disposal.

Programmes also differ according to the level of victim involvement, with some using face-to-face meetings, or indirect mediation, while others rarely involve victims at all. Even the very nature of the offence and type of offender that can be referred differ. Some schemes only take first time offenders who have committed relative minor offences, while others consider a whole range of offences and individuals who have offended in the past.

These divergences in practice, law and theory present considerable challenges in trying to make sense of both restorative justice and mediation in relation to criminal justice. This chapter, therefore, attempts to untangle some of the complexities and differences in practice that exist and it explores examples of mediation and restorative practice across a number of jurisdictions, particularly across Europe. It also considers the potential to further develop mediation and restorative justice, and underlines the ability of such schemes to deliver considerable advantages in the delivery of criminal justice to victims, offenders and broader society.

The chapter presents an overview and examples of four of the more common forms of mediation and restorative justice that operate in European youth justice systems. These are victim-offender mediation; community-based panels or reparation boards; police-led restorative practices and “cautioning”, and family group conferencing models. Each of these schemes of practice is considered in turn, focusing on practical issues of how they operate and research evidence concerning their impact.

## **2. Victim/Offender Mediation (VOM)**

Victim/Offender mediation is currently the most popular form of restorative practice in continental Europe. Many of these schemes have their roots in programmes that were developed in North America in the mid-1970s, but found favour among European policymakers during the 1980s, as a broader debate emerged on how victims and offenders might be given a better opportunity to participate in criminal justice (*Pelikan-Trenczek* 2006). The aim of mediation is to give victims and offenders a safe environment in which they are able to discuss the crime, its impact and the harm it may have caused, and to allow an opportunity to put right the harm caused. Some forms of VOM limit the role of the offender and victim by using “shuttle” type interactions or “go-betweens”, thereby limiting the victim’s and offender’s contact with each other. More

commonly however, the mediation takes place on a face-to face basis between the victim and offender, with the mediator acting as a neutral facilitator.

The majority of the mediation projects available are used as forms of diversion away from criminal sanctioning and are usually restricted to minor juvenile or adult offenders (*Miers/Willemsens* 2004). The decision on whether to use mediation is often made by the prosecutor, before cases make it to court. Most mediation programmes available are not explicitly restorative and only recently has there been an emphasis on providing programmes that have a strong restorative focus. There is considerable variation in the types of programmes and some are based on an extension of welfare legislation, rather than being used as a punishment, or sanction of the court (*Pelikan/Trenczek* 2006). But, as *Miers/Willemsens* (2004) note, most schemes are characterised by being diversionary, including less serious offences against property and the person.

Although many descriptive accounts of various European restorative programmes exist, the considerable variation in what they do and how they operate makes direct comparisons difficult. This is compounded by a general lack of research evaluating such schemes. In their review of different restorative programmes across Europe, *Miers/Willemsens* (2004) note, that the paucity of evaluative data makes comparisons problematic. While the authors find the results of emerging research as generally positive, they caution against other than the most parsimonious of interpretations of these data. Bearing this caveat in mind, it is worthwhile highlighting recent developments in six jurisdictions where mediation projects are among the most developed: *Austria*; *Finland*; *France*; *Germany*; *Norway*; and *Spain* (Catalonia). At the end of the section, a brief overview is also given of the *Dutch* Halt scheme, which is based on a variation of the VOM model.

### *Austria*

In *Austria*, mediation is a relatively common means of diversion for both juvenile and adult offenders, with around 10,000 cases being adjudicated in this manner every year (*Hofinger et al.* 2002). Although Austria has a reputation as a conservative society with a punitive orientation in criminal justice, victim/ offender mediation or *Außergerichtlicher Tatausgleich* (ATA) has a long tradition in the country (*Pelikan* 2000). While literally translated as “out-of-court offence compensation”, the concept implies much more than a victim and offender simply negotiating a financial settlement. Instead, the process is designed to ensure that a much more comprehensive form of restitution is delivered which is “socially constructive and more directly related to the victim: its goal – as an additional instrument of the penal system – is restoration of public peace after an offence” (*Löschnig-Gspandl/Kilchling* 1997, p. 59). Mediation will thus generally comprise three distinct components: compensation for any personal injury, loss or damage caused, whether directly or indirectly, by an offence; reconciliation talks.

apologies, help for the victim etc. and, in exceptional cases; and community service or payments to public welfare institutions (so-called "symbolic restitution" (*Löschnig-Gspandl/Kilchling* 1997, p. 59).

Mediation was placed on a statutory footing for young people through the Juvenile Justice Act 1988. Following the success of pilots, the scheme was gradually extended to adult offenders through a series of further pilots in the early 1990s and amendments were subsequently made to the Criminal Procedure Act (CCP, *StPO*) in 1999 to accommodate the new arrangements (see further *Pelikan* 2000). The decision to refer an offender to mediation is entirely discretionary and usually rests with public prosecutor on receiving the file, although the court may also make such an order at a later point in the criminal process. Article 90 CCP stipulates that diversion may be ordered in one of four circumstances: a) where the facts do not show "severe guilt"; b) where there has been no loss of life; c) where the offence is punishable by under 5 years in prison; or d) where no punishment is considered necessary to prevent the alleged offender or others from committing further crimes.

The legislation then proceeds to provide for a range of diversionary measures. There are no concrete rules as to how certain types of offences should be disposed of; so the magistrate has considerable leeway in determining whether or not a case is suitable for referral. Mediation, however, is only possible where the offender has agreed to accept responsibility for the offence; agreed to make some effort to try to repair the damage; and to reflect on the reasons that led to the offence. The victim's consent is also necessary in cases involving adult offenders, unless this consent is withheld for reasons that are not relevant to the criminal proceedings (*Hofinger et al.* 2002). In addition, mediation is not regarded as appropriate for petty misdemeanours, or for juveniles needing a probation officer assistant because of their psychological and social problems (*Hofinger et al.* 2002).

One notable feature of the *Austrian* scheme is that the legislation draws little distinction between juveniles (aged 14-18) and adult offenders (*Bruckmüller et al.* in this volume). Where juveniles are concerned, Article 90 of the Criminal Procedure Act continues to apply, but must be read in conjunction with the provisions of the Juvenile Justice Act 1988. Section 5 of the Act stipulates that the upper limits of fines and custodies for young offenders are half of that for adults (no minimum sentences are prescribed). In practice, this allows for a wide range of offences to be diverted (*Hofinger et al.* 2002). In addition, where the victim fails to consent to participate in mediation, the offence may still be diverted providing the offender expresses a willingness to offer some form of compensation.

As regards the practical operation of mediation, it is organised and conducted by ATA units, which are part of a semi-autonomous Probation Service. The units tend to operate autonomously until the mediation is complete and a final report has been submitted to the public prosecutor or judge. Mediation usually takes place directly: with the victim, offender and mediator in

the same room. Unlike conferencing, supporters and representatives of the wider community are not generally permitted in the room, unless juveniles are involved. Occasionally indirect or "shuttle mediation" is arranged where the parties are reluctant to meet in person. It should be stressed that the mediation is not intended to rehabilitate the offender per se. Instead, it is geared to "work towards a situational change and a change of interactional conditions" (Hofinger *et al.* 2002). Clear criteria for imposing sanctions are fixed in advance and the offender's due process rights must be safeguarded at all times. In relation to young offenders, imprisonment is to be regarded as the last resort and there are a variety of non-custodial measures which ought to assume priority (Hofinger *et al.* 2002).

Successful operation of the programme is heavily dependent upon close co-operation between the ATA units and more established voluntary formal criminal justice agencies. Mediators meet regularly with members of the judiciary and representatives of the public prosecutor's office meet to share experiences and discuss on difficult cases. In addition, if the public prosecutor is unsure about the kind of diversionary measure that would be best suited to a particular case, he/she can theoretically refer it to a so-called "clearing house", whereby the Probation Service will offer assistance in tailoring the best solution (Hofinger *et al.* 2002).

Evaluations of the *Austrian* system of victim-offender mediation have been broadly positive. (Hofinger *et al.* 2002) summarise a range of studies which report a high degree of willingness among both victims and offenders to take part in VOM. Moreover, around 75% of all cases referred resulted in a successful outcome. Qualitative analysis of the data also indicated a shift in officials' (judges, prosecutors) perception of crime and punishment towards the value of non-court oriented disposals, but the extent and durability of this shift remains a matter of conjecture.

### *Finland*

Victim-offender mediation has been practised in *Finland* since 1983. The practice expanded rapidly during the 1980s and 1990s, as policymakers sought new ways to deal with social problems facing children and young people (Eskelinen/Iivari 2005). Mediation services are now available throughout the country, and are financed and managed by municipal authorities.<sup>2</sup> In 2006, the *Finnish* Parliament passed the Law on Mediation (1015/2005). The purpose of the legislation, which covers both civil and criminal cases, was to extend VOM throughout the entire country, so that every citizen would have access to mediation services on demand. Whilst the new legislation did not radically alter the practices which had been developing throughout the country over the

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2 Not all municipal authorities provide mediation services. Using data obtained in 2001, Eskelinen/Iivari 2006 estimate that just over half municipal authorities are equipped to deliver services.

previous 20 years, it did amend the Criminal Code to provide that an agreement or settlement between the offender and the victim which is now a possible ground for mitigation in sentencing, and could result in the waiver of any further penal sanction altogether (*Lappi-Seppälä* in this volume).

While there are no recent figures as to the number of referrals to mediation, studies conducted in the 1990s suggested an average of 3,000 cases per annum (*Miers et al.* 2001; *Pelikan/Trenczek* 2006). Prior to the passage of the new legislation, practices tended to vary from one municipal district to another, with little uniformity in terms of the types of cases handled. In most municipalities, the focus is on young offenders, although in some areas adult offenders may also be eligible for mediation (*Eskelinen/Iivari* 2005). However, the new legislation should ensure a more uniform approach to practice.

Referrals are generally made as a diversionary measure by the police (who refer around 80% of all cases), though prosecutors and judges may also make referrals (*Pelikan/Trenczek* 2006). It is also possible for a party (or the parents of a young offender) to contact mediation officials directly or inform the police of their willingness to mediate. Thus the process is not tied to any one particular agency of the criminal justice system, and may commence as a diversionary measure, before or during the criminal investigation or trial, or after sentencing – depending on where the referral has come from. Likewise, cases involving domestic violence are afforded a high priority in some areas, while authorities elsewhere may refuse to take on such cases at all (*Iivari* 2000).

VOM will now be organised and financed by the Ministry of Social Affairs and Health, through five provincial offices. Services are co-ordinated by local government, with some municipal authorities opting to participate in a shared service or buy in services from elsewhere (*Miers et al.* 2001). *Iivari* (2000) reports, however, that many offices are understaffed and under-resourced, which in turn affects the quality and development of mediation activities.

In terms of how mediation operates in practice, sessions are conducted according to a series of protocols and memoranda drawn up by working groups on developing mediation, appointed by the Ministry of Social Affairs and Health. The mediation sessions themselves are co-ordinated by volunteers. There are currently around 900 voluntary mediators in Finland, who are trained using materials produced by the *Finnish Mediation Association*. The course provides the participants with basic information about theories behind mediation in the criminal justice system, including functions of the main criminal justice agencies, rules on co-operation, negotiation skills and the relevant legislation. *Elonheimo* (2003) suggests that the standard 30 hours of training (plus six hours of practical mediation) is insufficient to hone the skills required by mediators to encourage parties to engage in meaningful dialogue. In his view, training tends to be “parsimonious and particularistic”. *Iivari* (2000) also notes that the standard of training is variable across different localities, and that opportunities for further training and development tend to be relatively under-developed at present.



The process itself is entirely consensual for both the victim and offender, with each case usually being overseen by two mediators. The following account is offered by *Iivari* (2000): "The mediation process starts with preliminary contacts. The mediation office or one of its mediators contacts both parties separately, asking whether they are willing to take the matter into mediation. If all parties are agreed, the first mediation session will be held. For the majority of the cases this will suffice, but if needed, more sessions are arranged. During these sessions the mediator's principal role is to mediate; he/she does not try to lead the parties into one direction or another, but tries to mediate between them so that they both, understanding one another's viewpoint, can come to an agreement. If mediation is successful, a written contract is prepared. The contract includes the item (offence type), the content of the settlement (how the offender has consented to repair the damage), place and date of restitution as well as the consequences of a breach of contract."

Where the contract is breached, mediators may attempt to negotiate a new payment schedule. If this fails, the contract is deemed to be terminated and the parties are notified that they may deal with their case through the official court process. However, even where parties honour their commitments under the agreement, this does not necessarily herald the end of the penal process. If the offence is relatively minor in nature (known in *Finnish* law as a "complainant offence"), the agreement will usually bring the matter to a close and the prosecutor will generally drop the charges (*Iivari* 2000). If the offence is more serious in nature, it is treated as a "non complainant offence", and the fact that the parties have been involved in a successful mediation will not necessarily bring the matter to a close. The principle of legality dictates that the case will still usually be heard by a court. Depending on the gravity of the offence and a range of other factors, the prosecutor may then use his or her discretion to drop the case; this is likely to follow if subsequent prosecution would seem "either unreasonable or pointless" due to a reconciliation, and if non-prosecution would not violate "an important public or private interest" (*Lappi-Seppälä* in this volume). However, even where the case does proceed to court, the judge may opt to mitigate sentence or even refrain from imposing a sentence altogether (*Iivari* 2000).

Although some research was conducted into the operation of the schemes in the latter half of the 1990s, recent empirical studies have been thin on the ground. *Iivari* (2000) reports a major study carried out by *Mielityinen*. He observed that almost half (44%) of the cases were so-called complainant crimes (i. e. minor offences, vandalism, disturbances of domestic peace etc.), and 54% of cases were non-complainant offences (i. e. assault and battery including family violence, robbery, fraud and property crimes). The remaining 2% of the cases involved disputes and quarrels. It was also notable that mediation schemes were not only targeted to conflicts between private individuals: in almost half of the cases, there was a corporate victim (e. g. shopkeepers or municipalities). In 1997, 70% of all the cases referred for mediation resulted in mediation being

started. Of all the mediation negotiations commenced, 60% ended in an agreement. Of all the contracts, some 68 % were fulfilled.

More recent commentary on the *Finnish* schemes tends to be of an anecdotal nature. *Iivari* (2000) holds a generally positive view of the *Finnish* scheme. Despite being located outside the formal criminal justice system, he believes that there is widespread support and co-operation on the part of the police, prosecutors and courts, who have developed a "very positive attitude to mediation". He also asserts that the public are largely supportive of the concept. A slightly less optimistic picture is presented by *Elonheimo* (2003), who co-ordinated a small-scale evaluation of 16 mediation sessions by law students in the city of *Turku*. He reports a number of advantages of mediation over conventional criminal practices including the ability of the parties to tell their stories in their own words; the promotion of the victim's reparatory interests; motivating offenders to provide compensation; and relatively high levels of satisfaction amongst all parties. However, not all aspects of practice were found to be operating satisfactorily. Issues giving rise to concerns included a reluctance among juvenile offenders to participate in the process; insufficient emphasis placed on the value of pre-mediation meetings; the tendency of the parents of juveniles to dominate the discussion; the lack of creativity in formulating reparation agreements; and the fact that referrals were relatively few in number and tended to concern very petty offences.

### *France*

Victim-Offender mediation (*médiation pénale*) for adults has been developing in *France* since the early 1980s. As far as juveniles are concerned, prosecutors or judges have been empowered to issue reparation orders in cases involving offenders under the age of 18 since the end of the Second World War, pursuant to Ordinance of 2 February 1945, that either The *reparation pénale* is intended to devise a form of action plan that is characterised by strong educational and rehabilitative elements. These will be overseen by education officers or social workers, who are employed or certified by the national agency for "judicial protection of youth" (*Protection Judiciaire de la Jeunesse* or *PJJ*). *Milburn* (2002a, p. 8 f.) offers the following description of how the scheme operates in practice:

"Three steps can be identified in the process. The first one consists of an assessment of the juvenile: his personal situation and the nature of the offence. Parents are generally invited to participate. The education agent may thus assess the capacity of the young person to participate in a reparation process and, if not, see if there are specific causes for his misbehaviour... During this first interview, the young person and his parents are told the general principles of the measure and asked if they agree with them.

If so, then a second set of interviews starts with the young person to prepare him for the reparation activity. The purpose, during this phase, is for the juvenile to understand the negative value of his misdemeanour and to work out a positive outcome by choosing a relevant activity, which is likely to restore his own self-esteem and his relationship with the local community.

The third sequence – the activity itself – is not meant to be a work performance but a valuable achievement acknowledged as such by the beneficiary. The latter may be the victim him/herself – whether a private citizen or a public or private organisation – or another organisation which takes on the supervision of such an activity. They may be public services, charity organisations or community services.”

Since the 1993 reforms, juveniles may also be referred for victim-offender mediation (*médiation pénale*) by the prosecutor, the juvenile court, or the children’s judge. If requested by the prosecutor, indictment is avoided if the subsequent mediation procedure is successful (*Milburn* 2005). While the format of the mediation will be largely similar to that which is used for adult offenders, specific alterations will often be made to accommodate the particular needs of juveniles. In particular, the offenders’ parents will need to give their consent and agree to be present at all the mediation sessions. The court is charged with the responsibility of ensuring any negotiated settlement is proportionate and has elements of rehabilitation.

The operation of both the reparatory and mediation schemes for juveniles was evaluated by *Milburn* (2002). He reported a high level of dependency among mediators upon the prosecutor’s office which forwards the cases to the penal mediation agency. Moreover, many prosecutors seemed keen to want to keep a close eye on the mediators’ actions and exercise a degree of control over their actions. There was also a lack of consensus at national level as to what mediation for young offenders should involve. As mediation for the under 18-years-olds is not explicitly considered by the law, there has been no official monitoring of its practices.

### *Germany*

As in many other European jurisdictions, VOM (*Täter-Opfer-Ausgleich*) was first piloted in a number of cities across the Federal Republic of *Germany* in the mid-1980s. These expanded rapidly, and today there are approximately 400 schemes in operation, dealing with an annual caseload of around 20,000 cases. Approximately 13,000 of these involve juveniles (*Kilchling* 2005). Unlike certain other jurisdictions, there is no single organisation charged with delivering VOM. Instead, mediation is delivered by many different public agencies and voluntary organisations. In the case of juveniles, most schemes fall within the remit of the juvenile court office, though some are also run by social services or operate entirely independently (*Dünkel* 1996; *Bannenberg* 2000).

Financing therefore varies both in source (and in amount): the local social service or juvenile court budgets, or in the case of the independent providers, a mix of public and private funds (*Miers et al.* 2001).

About two thirds of the programmes deal solely with juveniles and one third also work with adults (*Pelikan/Trenczek* 2006). Referrals to mediation can be made at any stage of the penal procedure; however, in practice, most cases are assigned by prosecutors and only a few by judges during the trial (*Kerner/Hartmann* 2005 cited by *Tränkle* 2007). A few programmes also accept self-referrals by victims or offenders (*Trenczek* 2001). A broad range of cases are referred, including assaults, thefts and robbery and criminal damage (*Dünkel* 1996; *Kerner/Hartmann* 2005). The manner in which mediation is conducted varies amongst the schemes, and may involve both direct and so-called "shuttle"-mediation (*Kilchling* 2005). There is generally only one mediator in charge of conducting an individual mediation procedure. One distinct feature of *German* practice is that, unlike most other VOM schemes in Europe and North America, the offender is always approached first. This practice was developed in order to protect the victim from emotions at a stage in the process when it is still unclear whether the offender is willing to participate or not (*Kilchling* 2005).

During the 1990s, formal legal provision VOM was gradually integrated into the *German* Criminal Procedure Act (*StPO*) and in the Juvenile Justice Act (*JGG*). As far as the latter is concerned, judges are empowered to refer any case to VOM (§ 10 (1) No. 7 *JGG*), and the public prosecutor can also opt to halt procedure if the juvenile seriously engages in a reconciliation process (§ 45 (2) 2 *JGG*).

Despite the rapid expansion of VOM (VOM schemes are available in almost 100% of all juvenile court districts, see *Dünkel/Geng/Kirstein* 1998, p. 167 ff.), and the fact that it has been placed on a well-developed legislative footing, there seems to be resistance on the part of both the police and the legal profession to make widespread use of mediation with only 5-8% of criminal cases being dealt with by mediation, in spite of the fact that over 25% of all charges are eligible (*Pelikan/Trenczek* 2006; *Dünkel* 1996; *Dünkel/Geng/Kirstein* 1998). Similarly, *Miers et al.* (2001) cite research published in 1997 which showed that of 450 judges and 667 public prosecutors throughout *Germany*, only 3% and 11% per cent respectively had made any mediation referrals in the previous year. *Trenczek* (2002) states that many lawyers see mediation as a burdensome and time-consuming process, whilst *Bannenberg* (2000) suggests, that resistance is primarily attributable to the fact that most public prosecutors and judges are unfamiliar with the procedure. In the view of *Kury/Kaiser* (1991, p. 5), most judges and prosecutors in *Germany* in the past regarded the victim predominantly in his or her role as a witness to criminal proceedings, which are essentially structured around the conception of crime as an offence against the state.

Thus, as in many other European jurisdictions, the ultimate success of mediation is inevitably hindered by the reluctance of lawyers and judges to acknowledge the potential of the procedure. In particular, official communication

in terms of formal co-operation between mediators, prosecutors and the court seems to be rather poor, with virtually no discussion of which cases might be suitable for referral (*Kilchling* 2005). The manner in which the process of mediation itself is conducted is subject to very little regulation, thus standards and styles will vary considerably (*Pelikan/Trenczek* 2006). Some federal states publish their own guidance and training standards, but these are by no means uniform throughout the country. Increasingly, however, there would seem to be a move towards finding consensus on issues of good practice. In 2002, the National Mediation Association (*Bundesverband Mediation*) published a handbook of some 1,500 pages, and most schemes now conduct their work according to these standards (*Kilchling* 2005). However, it is perhaps unsurprising that *Tränkle* (2007) found a number of problems in the *German* mediation sessions she observed. Although her research was focused on schemes involving adults, her findings are also likely to bear an influence on the operation of juvenile mediation schemes. *Tränkle* reported that there was a lack of understanding among the participants of the purpose and value of mediation; a predominance of bureaucratic and legalistic styles; uncertainty among participants as to the appropriate role of the mediator; and sometimes a failure of mediators to provide victims and offenders with adequate information in advance of mediation.

### *Norway*

Discussions of alternative penal approaches in *Norway* were triggered in the late 1970s following the publication of *Nils Christie's* seminal article, "Conflicts as Property" (1977, see Chapter 1). A report to Parliament focusing on criminal policy in general, and juvenile offenders in particular, prompted the Government to establish a project entitled Alternatives to Prison for Juveniles in 1978, which sought to test a range of new ways of dealing with young offenders (*Kemény* 2005). It should be noted, however, that *Norway* lacks any distinct juvenile justice system; the age of criminal responsibility is 15 years and young people below this age will be dealt with under the social welfare system. For those over the age of 15, the Municipal Mediation Service Act 1991 placed mediation on a statutory footing and specific powers to make referrals to mediation and to discontinue proceedings are provided to prosecutors by ss. 71a and 72 Criminal Procedure Act 1998. Further legislation was passed in 2004, with responsibility for organising mediation passing from municipal authorities to 22 public mediation services run directly by the central Ministry of Justice.

Today *Norway* has the highest number of mediation cases in Europe. Currently the caseload consists of about 5,000 to 6,000 individuals referred to mediation each year, of which about 3,000 are criminal cases, mostly consisting of less serious property and minor personal offences (*Miers/Willemsens* 2004). For the most part, mediation referrals are made by the police or prosecutor.

although it can also be ordered by courts as part of a community sentence or as a condition of a suspended sentence.

Once the question of guilt has been resolved, the prosecutor must make a determination whether the case is suitable for referral to mediation. The prosecutor's discretion is not entirely unfettered; he or she must consider that the case is "suitable". Typical cases described in the circular letter include theft, vandalism, joyriding and violence (minor assaults) arising out of a preceding conflict. Providing the parties agree on the facts of the case and consent to the process, mediation will be offered as an alternative to formal penal sanctions. The prosecutor should also take into account the need for an offence to have involved a personal victim, as well as considerations relating to individual deterrence. Thus, despite mediation being fairly well spread throughout the country, it is still generally confined to less serious offences and retains its diversionary character (*Kemény 2005*).

In terms of how mediation works in practice, the legislation provides for direct face-to-face meetings between victims and offenders. Either party may bring along a supporter, but legal representation is not permitted. The mediation event may be brief, as is typically the case with offences against property, or prolonged, as is the case with neighbour disputes or violence (*Miers et al. 2001*). Services are usually provided by trained volunteers, who receive a nominal fee as well as having any related costs reimbursed. Volunteers are trained through a national accreditation programme, and are accountable to a co-ordinator based within the Ministry of Justice. In addition, the Ministry of Justice arranges annual conferences and publishes a regular journal for mediators which are intended to inform and to generate and exchange good practice (*Miers et al. 2001*).

Research indicates that the vast majority of mediated cases (91%) reach an agreement, and 95% of these agreements are fulfilled. The major forms of disposals include compensation (41%), work (21%), reconciliation (21%), compensation and work (7%) (*Kemény 2005*). In addition, evaluations conducted in the mid 1990s showed that a very high proportion of victims and offenders expressed satisfaction and said they would be prepared to recommend it to others (*Paus 2000; Kemény 2005*). Little research has been done in terms of measuring recidivism, but *Kemény (2005)* notes that indications to date are that incidences of recidivism is slightly lower with VOM than with traditional penal responses.

### *Spain (Catalonia)*

VOM has undergone considerable expansion across *Spain* in recent years, but this is particularly true in the autonomous regions including the Basque country, Castille la Mancha and the Balearic Islands. However, by far the most significant developments have occurred in Catalonia, where, since the early 1990s, mediation has been regarded as a primary response to juvenile offending. Approximately 3,000 young offenders are brought before the juvenile courts

each year, and around half of these are dealt with through the Catalanian Department of Justice's mediation programme (*Miers et al.* 2001).

The current legal framework is contained within Law OL 5/2000, which provides that VOM with juveniles (aged 14-18) may be used in two different ways. First, it may be used as a diversionary device by the public prosecutor. Referral is intended to be discretionary, with the prosecutor being able to refer an offence to mediation providing the offender repairs the harm caused to the victim or expresses a willingness to do so (*de la Camara* 2002). In these circumstances, no further action will be taken by the prosecutor providing the offender carries out his obligations under the agreement. Under Article 19(2), any decision to discontinue to action is provisional and will depend upon the juvenile's compliance to the VOM agreement. In cases involving serious felonies, the action may not be abandoned until the mediation process and any reparation are completed. Secondly, the court may postpone sentencing pending mediation following a request by prosecutor or by any of the parties. In these circumstances, the judge will request an initial report from the mediator confirming that the case is suitable for mediation. Once the mediation has taken place and the agreement is completed, a report is issued to the judge, who must assess the legality of the agreement and whether the law demands the imposition of any further penalty. A useful overview of the actual mediation process is offered by *Vall Ruis* (2002):

"In the first meeting the mediator explains to the offender the characteristics and requirements of VOM. If the offender indicates a willingness to enter the programme, if his/her lawyer agrees, and if the mediator deems mediation an appropriate approach for a specific case, the process can be started. The next important step involves contacting the victim and explaining the aim and the characteristics of the mediation process. The victim is offered the possibility to take part in the programme. If the victim chooses not to participate, the process has to be terminated; otherwise it moves forward until an agreement is reached or until it becomes clear that an agreement is not feasible. In any of these cases the mediator informs the judge of the mediation result."

A number of evaluative studies have been undertaken to date. Their findings have been largely very positive. *Barberán* (2005) reports that the scheme allows for a "win-win" situation: justice is perceived as closer to the parties involved and its social image is improved. In this sense, it is an effective means to encourage young people to take responsibility for their actions. The common experience among offenders and victims is that the judiciary has reacted fairly to the offence and it offers both of them an opportunity to participate in formulating a solution. The specific nature of particular offences is better understood, as are the characteristics of the conflict that brought it about. As a result, victims do not feel as victimised, offenders feel more responsible, and both experience values useful to themselves and the community. However, a

more concerning findings was that the programmes had resulted in some degree of net-widening (drawing in some petty offences).

In terms of how the system might be improved, *Vall Rius* (2002) proposes that prosecutors and mediators should work more closely together to develop common goals and common understandings of VOM. A formal protocol of collaboration should be put in place and more specific criteria should be developed for making referrals. In addition, the "circle of dialogue" should be extended; schemes should work harder to include other actors within the criminal justice system such as juvenile judges, probation officers, victim support assistants, and lawyers. This would facilitate a deeper and more consistent change of attitudes, and would help stakeholders to address longer term conceptual in addition to ongoing organisational issues.

### *Netherlands*

A slightly different form of restorative intervention is adopted by the police in the *Netherlands*. There, the police can refer a first or second time juvenile offender (under the age of 16) to the HALT scheme. Established in the early 1980s (and now placed on a statutory footing), the scheme was one of the earliest crime prevention measures to be established in Europe with a clear restorative component. The programme is primarily offender-orientated; although victims are occasionally invited to participate in mediation, reparation is normally directed towards the wider community (*Blad* 2006). The scheme is primarily targeted at juveniles found to have been involved in vandalism and retail theft, though other forms of petty crime are also covered (*Kruissink* 1991).

HALT is a resource-intensive scheme, dealing with around 17,000 cases each year, and is staffed entirely by professionals (*Blad* 2006). The professional dealing with a particular case will try to negotiate an appropriate agreement with the offender, his/her parents, and the victim. The agreement will usually entail the young person agreeing to some form of community service or participating in some other worthwhile task. Providing the young person completes the programme as agreed, he or she will not be prosecuted. If, however, the young person declines the offer, or fails to complete the programme satisfactorily, the case will usually be referred to the public prosecutor (*Zandbergen* 1996).

## **3. Community-based panels and reparation boards**

Community-based panels or "reparation boards" are restorative based practices which are widespread in the United States. While the boards are primarily used for adult offenders convicted of non-violent offences, more recent initiatives have been focused on juvenile offenders. The boards are usually made up of a small number of community representatives, who meet the offender and talk through the reasons for the offending behaviour and how to rectify the harm that



has been caused. The board then decides the sanction that should be imposed for the offence, monitor compliance and will then report back to the court on its completion. The main goal of the boards is to empower communities and to promote offender responsibility and victim reparation (*Bazemore/Umbreit 2004*).

A similar panel scheme currently operates in *England and Wales* for young offenders who have been prosecuted for the first time through the courts. Under the Youth Justice and Criminal Evidence Act 1999, referral orders to young offender panels are made available to the youth courts as a primary court disposal method for first-time offenders between the ages of 10-17 years. The main aim of the panels is to provide first-time offenders with "opportunities to make restoration to the victim, take responsibility for the consequences of their offending and achieve reintegration into the law-abiding community" (*Home Office 2002*).

Following referral by a court, the panel decides how the offending should be dealt with and what form of action is necessary. If the victim wishes, they may attend the panel meeting and describe how the offence affected them. Parents are required to attend the panel meeting (if the young person is under the age of 16) and meetings are usually held in community venues. Government guidelines state that young people should not have legal representation at panel meetings, as this may hinder their full involvement in the process, but if a solicitor is to attend they may do so as a "supporter" (*Home Office 2002*).

The panel has to decide on an agreed plan which can provide reparation to the victim or community and include interventions to address the young person's offending. This can include victim awareness, counselling, drug and alcohol interventions and forms of victim reparation. The length of the order should be based on the seriousness of the offence, but panels are free to determine the nature of intervention necessary to prevent further offending by the young person (*Home Office 2002*). The young person must agree to the plan. However, if they refuse they will be referred back to the court for sentencing. Once a plan is agreed it is monitored by the Youth Offending Team and if the young person fails to comply with its terms they may be referred back to court for sentencing.

Referral orders were piloted in 11 areas across *England and Wales* between March 2000 and August 2001. Research concluded that, in the main: "within a relatively short time youth offender panels have established themselves as constructive, deliberative and participatory forums in which to address young people's offending behaviour" (*Newburn et al. 2002*). The orders were rolled out across the rest of *England and Wales* in April 2002, and in 2003/04 there were over 27,000 referral orders made, constituting 25 per cent of all court disposals (*Youth Justice Board 2004*).

*Newburn et al. (2002)* concluded from their research that the new orders were working well and many young people played an active role in their panel meetings. They found that 84 per cent of the young people felt they were treated with respect and 86 per cent said they were treated fairly. The research found that

75 per cent of the young people agreed that their plan or contract was “useful” and 78 per cent agreed that it should help them stay out of trouble (*Newburn et al.* 2002). Parents also appeared to be positive about the orders, and compared with the experience of the youth court, parents appeared to understand the referral order process better and felt it easier to participate (*Newburn et al.* 2002).

Despite the rather positive evaluation findings, a number of concerns have been raised concerning referral orders (*Goldson* 2000; *Haines/O’Mahony* 2006). It has been argued that such orders raise questions about informed consent as some young people and parents may feel forced into agreeing plans. Children as young as 10 years, without legal representation, may be drawn into signing into contracts affecting their liberty (*Cullen* 2004). Another concern is that the discretion of magistrates is curtailed in the legislation whereby minor first-time offenders must be referred to panels (*Ball et al.* 2001), effectively making them a mandatory sentence.

The research by *Newburn et al.* (2002) confirms this, as 45 per cent of the magistrates interviewed felt that the lack of discretion in the legislation undermined their authority. Crawford and *Newburn* (2003) also found that some panels had difficulty devising suitable plans because of a lack of local resources and that panel members believed that adequate local facilities and resources were crucial to the success of panels.

More fundamental problems with the referral order centre around the low levels of victim involvement in the process. In their research, *Newburn et al.* (2002), note that victims attended in only 13 per cent of cases where at least an initial panel meeting was held. Such low levels of victim participation obviously greatly limit any chance of “encounter, reparation, reintegration and participation” (*van Ness/Strong* 1997), supposedly essential for the restorative process. Furthermore, research has yet to establish whether such orders are having any net-widening effects and if they unnecessarily draw minor offenders further into the criminal justice system. Questions remain as to the extent to which such orders are truly proportionate to the offence committed and their longer-term impact on recidivism, especially by comparison to other disposals (*Mullan/O’Mahony* 2002). For these reasons, the extent to which referral orders encapsulate the core features of restorative justice remains questionable. However, unlike most restorative based programmes available in *England* and *Wales*, the referral order has been incorporated quite well into the courts and criminal justice process as a key response to youth offenders who plead guilty the first time they are prosecuted through the courts.

#### **4. Police-led restorative cautioning**

Police-led conferencing was first developed in Wagga Wagga, New South Wales and involved the adaptation of the New Zealand model of family group conferencing for the purposes of community-orientated policing (*Moore-*

McDonald 1995). In the first instance, offenders were brought together with their family and friends to decide how to respond to the offence, as in the New Zealand model, but the scheme was then extended to include victims and their supporters. The approach is based around *Braithwaite's* concept of "reintegrative shaming" (*Braithwaite* 1989). Thus these schemes seek to deal with crime and its aftermath by attempting to make offenders ashamed of their behaviour, but in such a way that encourages them to reflect on the consequences of the crime and to find ways of reintegrating them within the community.

The restorative caution attempts to reintegrate the young person, after they have admitted what they did was wrong, by focusing on how they can put the incident behind them, for example by repairing the harm through such things as reparation and apology (*O'Mahony/Doak* 2004). It thereby allows the young person to move forward and reintegrate back into their community and family. The whole process is usually facilitated by a trained police officer and often involves the use of a script or agenda that is followed in the conferencing process. The victim is encouraged to play a part in the process, particularly to reinforce upon the young person the impact of the offence on them, but as *Dignan* (2005) notes, restorative cautioning schemes have (at least initially) placed a greater emphasis on the offender and issues of crime control, than on their ability to meet the needs of victims.

During the 1990s, police-led restorative cautioning schemes expanded considerably in both North America and the *United Kingdom*. In the latter jurisdiction, two such schemes have been the subject of intensive evaluations: the programme run by the Thames Valley Police, and the scheme developed in *Northern Ireland* by the Police Service of Northern Ireland. Research by *Hoyle/Young* (2003) evaluated the Thames Valley scheme from 1998-2001. The evaluation was somewhat mixed. On the positive side, the researchers reported that offenders, victims and their supporters were generally satisfied and felt they had been treated fairly; both victims and offenders believed that the encounter helped offenders to understand the effects of the offence and induced a sense of shame in them; over half of the participants gained a sense of closure and felt better because of the restorative session, and four-fifths saw holding the meeting as a good idea. Less encouraging findings included the fact that a significant minority of victims and offenders felt they had not been adequately prepared for the process, or felt they had been pressured into it; facilitators occasionally seemed poorly prepared, and sometimes asked illegitimate questions (e. g. relating to prior offending or attempts to gather criminal intelligence); and some officers appeared to press offenders to apologise or make reparation. However, at the end of the research period the researchers noted that practice had improved considerably towards the end of the research period. Overall, their impression was that restorative cautioning represented a significant improvement over traditional cautioning, and it also appeared to be more effective in terms of reducing recidivism (*Hoyle/Young* 2003).

The Thames Valley model has now been integrated to different degrees by police forces across the *United Kingdom*, and was subject to further evaluation following the implementation of a similar model for juvenile offenders in *Northern Ireland* from March 2003. The Police Service of Northern Ireland police instigated two pilot schemes: one based in Ballymena, County Antrim and the other in Mountpottinger, Belfast. Both schemes adopted a restorative approach for juveniles under 17 years of age. All the young people had admitted involvement in the offence, but were diverted away from prosecution by way of a formal caution, delivered using a restorative framework.

These schemes were subject to an evaluation (*O'Mahony et al.* 2002), which examined a total of 1,861 juvenile liaison referrals made between May 1999 and September 2000, including 969 cases from Mountpottinger and 892 from Ballymena. The team also collected more detailed information about the backgrounds of individuals and any previous contacts they had with the police from a random sample of 265 case files, including all cases dealt with by way of restorative caution or conference.

On examination of cases that were dealt with using a restorative model, it was found that there were clear differences in practice between the two pilot areas. In Mountpottinger where the restorative scheme evolved from traditional cautioning practice, the sessions appeared to be used as an alternative to the traditional caution. Here, 39 of the 42 restorative cases were dealt with by way of a restorative caution without the presence of the victim, and only three were dealt with by a restorative conference including a victim. In Ballymena, however, the scheme had been developed from a local "retail theft initiative", and generally only dealt with shoplifting cases. Here, 25 of the 28 cases resulted in a restorative conference, though these mostly used a surrogate victim who was drawn from a volunteer panel of local retailers and only three cases were dealt with by way of a restorative caution.

The restorative sessions were usually facilitated by a trained police officer. While the majority of the restorative cautions took place in a police station, most of the conferences (primarily in Ballymena) took place elsewhere. Levels of victim participation were found to be low, with the actual victim attending only 20% of the conferences and in the Ballymena area (where most conferences took place), a surrogate victim was invariably used. The young person and their parent(s) usually attended, and occasionally a social worker or a teacher was also in attendance. The majority (over 90%) of the restorative sessions resulted in a written or verbal apology to the victim and in only 8% of the cases did the young person refuse to apologise. Few of the sessions resulted in any compensation or reparation, though the majority of cases in both locations involved retail theft, where goods were normally recovered immediately.

While the overall evaluation found the police were strongly committed to restorative ideals and had applied a considerable effort in attempting to make the new scheme a success, a number of pertinent concerns were identified by the

researchers including a lack of meaningful involvement of the victim; the fact that some venues (i. e. police stations) could not be considered a "neutral" location; the use of an extremely resource-intensive process to deal with relatively low-level offending.

Of greater concern was the fact that the researchers found evidence of net-widening; first time or petty offenders were sometimes drawn into the criminal justice system. Restorative cautions were most commonly used for less serious cases involving young juveniles (12 to 14 years) that previously would not have resulted in formal action. For instance, over 90% of the restorative conference cases were for minor thefts and 80% of these involved goods with values under 18 €. Indeed, in over half the cases, goods were worth less than 6 €. It was not uncommon to come across cases where a considerable amount of police time had been invested in arranging a full conference for the theft of a chocolate bar or a can of soft drink. Indeed, the profile of those given restorative cautions and conferences was more similar to those given "advice and warning" under the pre-existing regime than those cautioned previously and was not at all similar to those referred for prosecution. Some of the people dealt with under the scheme were very young, had no previous police contact or had only committed very trivial offences.

These findings highlight the danger that when informal alternatives are introduced into the criminal justice system they may serve to supplement rather than supplant existing procedures (*O'Mahony/Deazle 2000*). The question is thus raised as to whether it is appropriate to use restorative conferences, which are obviously costly and time-consuming, for mainly first-time offenders involved in petty offences. It could be argued that a better course of action might be to deal with such cases by way of "advice and warning", particularly where the value of goods is relatively low and to reserve the restorative cautions for more serious offences. Having said that, the researchers concluded that the restorative framework used in delivering the police caution was a considerable improvement on previous practice and was well received by the vast majority of participants.

## **5. Family Group Conferencing**

Family Group Conferencing (FGC) was first developed in New Zealand in the late 1980s as part of a more general initiative which sought to address difficulties in the way young people – particularly those from Maori backgrounds – perceived the criminal justice system (*Maxwell/Morris 1993*). The model sought to develop a more culturally sensitive approach to offending, through placing particular emphasis upon the desirability of including victims, offenders and communities in rectifying harm caused by criminal behaviour. Typically, a youth conference involves a meeting in which a young person is provided with the opportunity to reflect upon their actions, and offer some form of reparation to the victim. The victim, who is given the choice whether or not to attend, can explain to the offender how the offence has affected him or her as an individual.

Following group dialogue on the harm caused by the young person's actions, a "conference plan" is devised.

During the latter half of the 1990s, the New Zealand model was exported to many other criminal justice systems in North America and Australia. However, so far it has penetrated Europe to a lesser extent. The *Netherlands* is one of the few jurisdictions of continental Europe to have adopted a form of conferencing as a means of diversion. A number of different schemes are in operation, with most being administered by the police, HALT centres, or the prosecutor. Two specific forms of conferencing are used: "family group decision-making" and "youth justice conferencing", though neither has a legislative basis. The former tends to be used to resolve disputes arising within a family circle, and thus lies outside the criminal justice system. Occasionally, however, cases of domestic violence are referred to this process. The latter model, Youth Justice Conferencing, is often used in cases involving broader disputes.

The conference largely follows the traditional family-based New Zealand model, with victims and offenders bringing along their respective families and friends to discuss an ongoing dispute and agree solutions. Conferences are co-ordinated by a neutral facilitator, with each participant being given an opportunity to speak and ask questions, as well as contribute to the action plan. Although evaluative evidence is somewhat sketchy, initial research suggests that it has been relatively successful with the majority of participants reporting satisfaction with the process (*Miers/Willemsens* 2004). Despite the positive results, the overall number of cases referred for such programmes remains relatively small and in that sense restorative practices remain marginal to the *Dutch* criminal justice system (*Pelikan/Trenczek* 2006).

By contrast, in *Northern Ireland* conferencing is used as the primary response to youth offending. Here, the system has statutory footing in Part Four of the Justice (Northern Ireland) Act 2002. Additionally, The Youth Conference Rules (Northern Ireland) 2003 establish the procedures to be followed when convening and facilitating a conference. For the most part, the scheme follows the New Zealand process, described above. However, one key difference is the fact that in the Northern Ireland scheme, the plan is usually devised and negotiated with all of the parties present, including the victim. This plan takes the form of a negotiated "contract", with implications if the young person does not follow through what is required of him or her. Agreement is a key factor in devising the "contract", and the young person must consent to its terms. Ideally, the "contract" will ultimately have some form of restorative outcome, addressing the needs of the victim, the offender and wider community.

The Youth Conference Service was introduced in December 2003 in the form of a pilot scheme and initially was available for all 10-16 year olds living in the Greater Belfast area. In mid-2004, the scheme was expanded to cover young people living in more rural areas, including the Fermanagh and Tyrone regions. Section 63 of the Justice (Northern Ireland) Act 2002 provides for the

extension of the youth justice system to cover 17 year olds in the jurisdiction of the youth courts, which took effect from August 2005.

There are two distinctive types of conference available under the legislation: diversionary conferences and court-ordered conferences. In either case, the conference co-ordinator is responsible for submitting a plan to the prosecutor or court on how the young person should be dealt with for their offence. A decision to hold a diversionary conference is taken by the Public Prosecution Service. Unlike many restorative schemes elsewhere, diversionary conferences are not intended for minor first time offenders (they will normally be dealt with by the police by way of a warning or caution). Instead, the programme is aimed at young offenders who would normally be considered for prosecution in the courts. Providing a conference plan is agreed and successfully completed, the young person will avoid a court appearance and a subsequent criminal conviction. It is important to underline that two preconditions must be in place before a diversionary conference can proceed. First, the young person must admit to the offence; and secondly, he or she must consent to the process. If both these conditions are not in place, the offence will be disposed of in the normal way through prosecution in the Youth Court.

Court ordered youth conferences provided for in the legislation take place with a view to a youth conference co-ordinator providing a recommendation to the court on how the young person should be dealt with for their offence. The young person may be referred to a youth conference by a court, known as a court-ordered youth conference. The admission or establishment of guilt and consent of the young person are again prerequisites for a court-ordered conference to take place. A distinctive feature of the *Northern Ireland* system is that a court *must* refer a young person to a youth conference. This is subject to certain restrictions: when a magistrate refers a case they must take into account the type of offence committed. Only offences with a penalty of life imprisonment, offences which are triable, in the case of an adult, on indictment only and scheduled offences which fall under the Terrorism Act (2000) are not automatically eligible for youth conferencing. In effect, the vast majority of young offenders have to be referred for the youth conferencing process. The mandatory nature of court-ordered referrals highlights the intended centrality of youth conferencing to the youth justice system. In jurisdictions where referrals are discretionary, the uptake has often been low which has led to the marginalisation of restorative schemes to the periphery of the justice system (*Shapland et al.* 2004; *Miers et al.* 2001; *Crawford/Newburn* 2003).

Restorative youth conferencing has changed the face of the youth justice system in Northern Ireland and although it has only been in operation for a few years, early indications appear to be positive. The youth conferencing scheme has been subject to a major evaluation in which the proceedings of 185 conferences were observed and personal interviews were completed with 171 young people and 125 victims who participated in conferences (*Campbell et al.*

2006). This research allows us to reflect on the extent to which the scheme has been successful in achieving its aims and the extent to which it renders the justice system more accountable and responsive to the community as a whole.

The research findings were generally very positive concerning the impact of the scheme on victims and offenders, and found it to operate with relative success. Importantly, the research showed that youth conferencing considerably increased levels of participation for both offenders and victims in the process of seeking a just response to offending. The scheme engaged a high proportion of victims in the process: over two-thirds of conferences (69%) had a victim of some sort in attendance, which is high compared with other restorative based programmes (see *Maxwell/Morris* 2002; *Newburn et al.* 2003; *O'Mahony/Doak* 2004). Of these 40% were personal victims and 60% were victim representatives (such as in cases where there was damage to public property or there was no directly identifiable victim). Indeed, nearly half of personal victims attended as a result of assault, whilst the majority (69%) of victim representatives attended for thefts (typically shoplifting) or criminal damage.

The research demonstrated that victims were willing to participate in youth conferencing and 79% said they were actually "keen" to participate. Most (91%) said the decision to take part was their own and not a result of pressure to attend. Interestingly, over three quarters (79%) of victims said they attended "to help the young person" and many victims said they wanted to hear what the young person had to say and their side of the story: "I wanted to help the young person get straightened out". Only 55% of victims said they attended the conference to hear the offender apologise. Therefore, while it was clear that many victims (86%) wanted the offender to know how the crime affected them, what victims wanted from the process did not appear to be driven by motivations of retribution, or a desire to seek vengeance. Rather it was apparent that their reasons for participating were based around seeking an understanding of why the offence had happened; they wanted to hear and understand the offender and to explain the impact of the offence to the offender.

Victims appeared to react well to the conference process and were able to engage with the process and discussions. It was obvious that their ability to participate in the process was strongly related to the intensive preparation they had been given prior to the conference. Nearly all victims (91%) received at least an apology and 85% said they were happy with the apology. On the whole they appeared to be satisfied that the young person was genuine and were happy that they got the opportunity to meet them and understand more about the young person and why they had been victimised. On the whole, it was apparent, for the victims interviewed, that they had not come to the conference to vent anger on the offender. Rather, many victims were more interested in "moving on" or putting the incident behind them and "seeing something positive come out of it".

For offenders, it was evident that the conferencing process held them to account for their actions, for example, by having them explaining to the



conference group and victim why they offended. The majority wanted to attend and they gave reasons such as, wanting to "make good" for what they had done, or wanting to apologise to the victim. The most common reasons for offenders attending were to make up for what they had done, to seek the victim's forgiveness, and to have other people hear their side of the story. Only 28% of offenders said they were initially "not keen" to attend. Indeed many appreciated the opportunity to interact with the victim and wanted to "restore" or repair the harm they had caused. Though many offenders who participated in conferences said they did so to avoid going through court, most felt it provided them with the opportunity to take responsibility for their actions, seek forgiveness and put the offence behind them.

Youth conferencing was by no means the easy option and most offenders found it very challenging. Generally offenders found the prospect of coming face to face with their victim difficult. For instance, 71% of offenders displayed nervousness at the beginning of the conference and only 28% appeared to be "not at all" nervous. Despite their nervousness, observations of the conferences revealed that offenders were usually able to engage well in the conferencing process, with nearly all (98%) being able to talk about the offence and the overwhelming majority (97%) accepting responsibility for what they had done.

The direct involvement of offenders in conferencing and their ability to engage in dialogue contrasts with the conventional court process, where offenders are normally afforded a passive role - generally they do not speak other than to confirm their name, plea and understanding of the charges - and are normally represented and spoken for by legal counsel throughout their proceedings. Similarly, victims were able to actively participate in the conferencing process and many found the experience valuable in terms of understanding why the offence had been committed and in gaining some sort of apology and/or restitution. This, too, contrasts with the typical experience of victims in the conventional court process, where they often find themselves excluded and alienated, or simply used as witnesses for evidential purposes, if the case is contested (Doak 2008).

Nearly all of the plans (91%) following conferences were agreed by participants and importantly, victims were on the whole happy with the content of the plans. Interestingly, most of the plans centred on elements that were designed to help the young person and victim, such as reparation to the victim, or attendance at programmes to help the young person. Few plans (27%) had elements that were primarily punitive, such as restrictions on their whereabouts, and in many respects the outcomes were largely restorative in nature rather than punitive. The fact that 73% of conference plans had no specific punishment element was a clear manifestation of their restorative nature. But more significantly, this was also indicative of what victims sought to achieve through the process. It was clear from the research that notions of punishment and

retribution were not high on the agenda for most victims when it came to devising how the offence and offender should be dealt with through the conference plan.

Overall indications of the relative success of the process were evident from general questions asked of both victims and offenders. When participants were asked what they felt were the best and worst aspects of their experience a number of common themes emerged. For victims, the best features appeared to be related to three issues: helping the offender in some way; helping prevent the offender from committing an offence again; and holding them to account for their actions. Positive aspects of the conferencing were clearly non-punitive in nature for victims: most seemed to appreciate that the conferences represented a means of moving forward for both parties, rather than gaining any sense of satisfaction that the offender would have to endure some form of harsh punishment in direct retribution for the original offence. Victims and offenders expressed a strong preference for the conference process as opposed to going to court and only 11% of victims said they would have preferred if the case had been dealt with by a court. On the whole victims considered that the conference offered a more meaningful environment for them. While a small number of victims would have preferred court, identifying conferencing as "an easy option", this view was not held by the offenders. The offenders identified the most meaningful aspect of the conference as the opportunity to apologise to the victim, a feature virtually absent from the traditional court process. Yet, they also identified the apology as one of the most difficult parts of the process.

Very recent research findings have assessed the impact of the scheme on recidivism rates (*Lyness* 2008). These encouraging findings, which compare reconviction rates for young offenders given differing disposals, including custodial and community orders, show those given restorative conferences had a one year reconviction rate of 38% compared with a custodial rate of 73% and an overall community disposal rate of 47%.

## 6. Conclusions

Despite the issuing of the Council of Europe recommendations encouraging the application of restorative justice at all stages of the criminal justice process,<sup>3</sup> restorative practices and mediation still largely remain on the periphery of many European criminal justice systems. Moreover, they are often confined to less serious offences (*Pelikan/Trenczek* 2008). There has been a reluctance to embrace such practices in some jurisdictions, even though research evaluations have been generally positive. Agreements reached in mediation, especially for direct mediation, appear to be high and are usually fulfilled, with completion rates of between 60% to 100% being reported in the research (*Kerner/Hartmann* 2005).

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3 Recommendation (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters.

Furthermore, general satisfaction levels of participants and the willingness of individuals to participate in such schemes has been found to be high and victims, who participate, are usually significantly more satisfied than those who participated in the traditional criminal justice procedure (*Aertsen et al.* 2004).

Similarly, research on restorative justice has generally been positive. Restorative programmes often allow young persons, their families, and victims to play a role in guiding how the young person should be dealt with by the courts. They place specific emphasis on devolving decision making, or at least the power to make recommendations as to how youth offenders should be dealt, back to those most directly impacted by the offence – the victim, offender and his or her family. Research has also found that young offenders usually felt they had a better understanding of the consequences of what they had done following the conference, felt involved in the decision making process and were satisfied with the outcome. Similarly, victims generally expressed high levels of satisfaction with the process and outcome. The experience of mainstreamed restorative conferencing has been overwhelming positive and research has consistently illustrated that such conferences can more fully involve victims than conventional criminal justice.

The research evidence considering the impact of mediation and restorative justice on re-offending has also been positive. The weight of recidivism-based evidence demonstrates that such interventions usually have a modest, but statistically significant impact on reducing recidivism. Research evidence suggests that interventions that involve direct contact between the offender and victim are generally more successful than those that have indirect or no victim involvement. Specifically, it has been found that restorative interventions are better able to reduce reoffending if core elements of the restorative process are achieved, in particular, if they are inclusive, fair and forgiving and when offenders are remorseful and conference agreements are consensual.

However, it is important not to oversell the power of mediation and restorative justice simply in terms of their ability to reduce recidivism, or to just frame them as crime prevention measures. After all, it is unrealistic to think that a single mediation or restorative (or other) intervention is going to lead to radical changes in offending. Furthermore, mediation and restorative measures are not an option in cases where the defendant pleads innocent, or refuses to engage in such a process however they can be used effectively for many of offenders and offences.

There is obviously considerable potential to expand mediation and restorative measures further into criminal justice systems across Europe. Such measures offer considerable advantages, as noted above, in terms of delivering a better form of justice to those individuals most directly affected by crime. Thus mediation and restorative interventions need to be seen as a way that can improve on traditional justice systems in terms of holding offenders to account and encouraging them to accept responsibility for their actions; giving victims and offenders a fairer and more satisfying experience of justice, and producing outcomes that are more likely to result in recompense, forgiveness and reconciliation.

**Bibliography:**

- Aertsen, I., Mackay, R., Pelikan, C., Willemsens, J., Wright, M.* (2004): *Rebuilding Community Connections – Mediation and Restorative Justice in Europe*. Strasbourg: Council of Europe.
- Ball, C., McCormac, K., Stone, N.* (2001): *Young offenders: law, policy and practice*. London: Sweet and Maxwell.
- Bannenberg, B.* (2000): Victim-offender mediation in Germany. In: *The European Forum for Victim-Offender Mediation and Restorative Justice* (Ed.): *Making Restorative Justice Work*. Leuven: University of Leuven Press.
- Barberán, J. M.* (2005): Victim-Offender Mediation with Juvenile Offenders in Catalonia. In: *Mestitz, A., Ghetti, S. (Eds.): Victim-Offender Mediation with Youth Offenders in Europe. An overview and comparison of 15 countries*. Dordrecht: Springer.
- Bazemore, G., Umbreit, M. S.* (2004): Balanced and restorative justice: Prospects for juvenile justice in the 21<sup>st</sup> century. In: *Roberts, A. (Ed.): Juvenile Justice Sourcebook*. Oxford: Oxford University Press.
- Blad, J.* (2006): Institutionalizing restorative justice? Transforming criminal justice? A critical view on the Netherlands. In: *Aertsen, I., Daems, T., Robert, L. (Eds.): Institutionalizing Restorative Justice*. Cullompton: Willan Publishing.
- Braithwaite, J.* (1989): *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.
- Campbell, C., Devlin, R., O'Mahony, D., Doak, J., Jackson, J., Corrigan, T., McEvoy, K.* (2006): *Evaluation of the Northern Ireland Youth Conference Service*. NIO Research and Statistics Series: Report No. 12. Belfast: Northern Ireland Office.
- Crawford, A., Newburn, T.* (2003): *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice*. Cullompton: Willan Publishing.
- Cullen, R.* (2004): The Referral Order: The main issues arising from its evaluation and the Youth Justice Board's efforts to address them. *Childright* 204, p. 8-9.
- De La Camara, B.* (2002): VOM programmes and their relation to judicial actors in the Juvenile Criminal Justice System in Catalonia. Papers from the Second Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, Oostende, 10-12 October 2002.
- Dignan, J.* (2005): *Understanding Victims and Restorative Justice*. Maidenhead: Open University Press.
- Doak, J.* (2008): *Victims Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*. Oxford: Hart.

- Düinkel, F.* (1996): Täter-Opfer-Ausgleich. German experiences with mediation in a European perspective. *European Journal on Criminal Policy and Research*, 4, p. 44-66.
- Düinkel, F., Geng, B., Kirstein, W.* (1998): Soziale Trainingskurse und andere neue ambulante Maßnahmen nach dem JGG in Deutschland. Mönchengladbach: Forum Verlag Godesberg.
- Elonheimo, H.* (2003): Restorative Justice Theory and the Finnish Mediation Practices. Paper presented at the Third Annual Conference of the European Society of Criminology, Helsinki, 27-30 August 2003.
- Eskelinen, O., Iivari, J.* (2005): Victim-Offender Mediation with juvenile offenders in Finland. In: Mestitz, A., Ghetti, S. (Eds.): *Victim-Offender Mediation with Youth Offenders in Europe. An overview and comparison of 15 countries*. Dordrecht: Springer.
- Goldson, B.* (2000): *The New Youth Justice*. Lyme Regis, Dorset: Russell House Publishing.
- Haines, K., O'Mahony, D.* (2006): Restorative Approaches, Young People and Youth Justice. In: Goldson, B., Muncie J. (Eds.): *Youth Crime and Justice*. London: Sage.
- Hofinger, V., Pelikan, C., Birgit, Z.* (2002): Victim-Offender Mediation with Juveniles in Austria. Paper presented at Victim-Offender Mediation: Organization and Practice in Juvenile Justice Systems, Bologna, 19-20 September.
- Home Office* (2002): *The Referral Order and Youth Offender Panels: Guidance for Courts, Youth Offending Teams and Youth Offender Panels*. London: Home Office.
- Hoyle, C., Young, R.* (2003): Restorative Justice, Victims and the Police. In: Newburn, T. (Ed.): *Handbook of Policing*. Cullompton: Willan Publishing.
- Iivari, J.* (2000): Victim-offender mediation in Austria. In: *The European Forum for Victim-Offender Mediation and Restorative Justice* (Ed.): *Making Restorative Justice Work*. Leuven: University of Leuven Press.
- Kemény, S.* (2005): Victim-Offender Mediation with juvenile offenders in Norway. In: Mestitz, A., Ghetti, S. (Eds.): *Victim-Offender Mediation with Youth Offenders in Europe. An overview and comparison of 15 countries*. Dordrecht: Springer.
- Kerner, H.-J., Hartmann, A.* (2005): Täter-Opfer-Ausgleich in der Entwicklung: Auswertung der bundesweiten Täter-Opfer-Ausgleichs-Statistik für den Zehnjahreszeitraum 1993 bis 2002. Mönchengladbach: Forum Verlag Godesberg.
- Kilchling, M.* (2005): Victim-Offender Mediation with Juvenile Offenders in Germany. In: Mestitz, A., Ghetti, S. (Eds.): *Victim-Offender Mediation*

- with Youth Offenders in Europe. An overview and comparison of 15 countries. Dordrecht: Springer.
- Kruissink, M.* (1991): Halt-Program: Evaluation of a Diversion Program for Juveniles. In: Junger-Tas J., Boendermaker, L. (Eds.): The Future of the Juvenile Justice System. Leuven: ACCO.
- Kury, H., Kaiser, M.* (1991): The Victim's Position within the Criminal Proceedings – An Empirical Study. In: Kaiser, G., Kury, H., Albrecht, H.-J. (Eds.): Victims and Criminal Justice: Legal Protection, Restitution and Support. Freiburg i. Br.: Max-Planck-Institut für ausländisches und internationales Strafrecht.
- Löschnig-Gspandl, M., Kilchling, M.* (1997): Victim/Offender Mediation and Victim Compensation in Austria and Germany: Stocktaking and Perspectives for Future Research. *European Journal of Crime, Criminal Law and Criminal Justice*, 6, p. 1.
- Lyness, D.* (2008): Northern Ireland Youth Re-offending: Results from the 2005 Cohort. Northern Ireland Office, Research and Statistics Bulletin 7/2008. Belfast: Northern Ireland Office.
- Marshall, T. F.* (1999): Restorative Justice: An Overview. London: HMSO.
- Maxwell, G. M., Morris, A.* (1993): Families, Victims and Culture: Youth Justice in New Zealand. Wellington: Victoria University of Wellington.
- Maxwell, G. M.* (2002): Restorative Justice and Reconviction. *Contemporary Justice Review*, 5, p. 133.
- Miers, D.* (2001): An International Review of Restorative Justice. London: HMSO.
- Miers, D. and Willemsens, J.*, *Mapping Restorative Justice: Developments in 25 European Countries*. Leuven: European Forum for Restorative Justice.
- Milburn, P.* (2002) *La Médiation: Expériences et compétences*. Paris: La Découverte Coll.
- Milburn, P.* (2005): Mediation and Reparation for Young Offenders in France. In: A. Mestitz, A., Ghetti, S. (Eds.): Victim-Offender Mediation with Youth Offenders in Europe. An overview and comparison of 15 countries. Dordrecht: Springer Verlag.
- Moore, D. B., McDonald, J. M.* (1995): Achieving the Good Community: A local police initiative and its wider ramifications. In: Hazelhurst, K. M. (Ed.): Perceptions of Justice Issues in Indigenous and Community Empowerment. Brookfield: Ashgate.
- Mullan, S., O'Mahony, D.* (2002): A Review of Recent Youth Justice Reforms in England and Wales. Research and Statistical Series, Report, No. 8. Belfast: Northern Ireland Office.
- Newburn, T., Crawford, A., Earle, R., Goldie, S., Hale, C., Masters, G., Netten, A., Saunders, R., Sharpe, K., Uglow, S.* (2002): The Introduction of

- Referral Orders into the Youth Justice System, Home Office Research Study 242. London: Home Office.
- O'Mahony, D., Chapman, T., Doak, J.* (2002): Restorative Cautioning: A Study of Police Based Restorative Cautioning Pilots in Northern Ireland. Belfast: Northern Ireland Office.
- O'Mahony, D., Deazley, R.* (2000): Juvenile Crime and Justice. Criminal Justice Review Group Research Report 17. London: HMSO.
- O'Mahony, D., Doak, J.* (2004): Restorative Justice: Is more better? *Howard Journal*, 43, p. 484.
- Paus, K.* (2000): Victim-offender mediation in Norway. In: *The European Forum for Victim-Offender Mediation and Restorative Justice* (Ed.): Making Restorative Justice Work. Leuven: University of Leuven Press.
- Pelikan, C.* (2000): Victim-offender mediation in Austria. In: *The European Forum for Victim-Offender Mediation and Restorative Justice* (Ed.): Making Restorative Justice Work. Leuven: University of Leuven Press.
- Pelikan, C., Trenczek, T.* (2006): Victim offender mediation and restorative justice: the European landscape. In: *Sullivan, D., Tifft, L. (Eds.): Handbook of Restorative Justice: A Global Perspective*. Abingdon: Routledge.
- Shapland, J., Atkinson, A., Colledge, E., Dignan, J., Howes, M., Johnstone, J., Pennant, R., Robinson, G., Sorshy, A.* (2004): Implementing Restorative Justice Schemes (Crime Reduction Programme): A Report on the First Year. Home Office Online Report 32/04. London: Home Office.
- Tränkle, S.* (2007): In the shadow of penal law: Victim offender mediation in Germany and France. *Punishment & Society*, 9, p. 395.
- Trenczek, T.* (2001): Victim-Offender Mediation in Germany: ADR Under the Shadow of the Criminal Law? *Bond Law Review* 16, p. 5.
- Vall Rius, A.* (2002): Victim-offender mediation in the criminal justice system for adults in Catalonia. Paper presented at the Second Conference of the European Forum for Victim-Offender Mediation and Restorative Justice. Oostende, 10-12 October.
- van Ness, D., Strong, K.* (1997): Restoring Justice. Cincinnati/OH: Anderson Publishing.
- Youth Justice Board* (2004): Summary of Research into the Issues raised. In: *The Introduction of Referral Orders in the Youth Justice System*. London: Youth Justice Board.
- Zandbergen, A.* (1996): Shaming in a Dutch diversion project. *European Journal on Criminal Policy and Research*, 4, p. 95.